BAR ASSOCIATION OF SAN FRANCISCO

Report of Section on Reform of the Jury System

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Report of Section on Reform of the Jury System

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To the President and Officers of the Bar Association of San Francisco—

Gentlemen:

Your section on Amendment of the Laws Affecting Juries hereby submits the following report:

1st: We recommend the submission of a constitutional amendment amending section 19 of article 6 so that judges may charge juries with respect to matters of fact as well as matters of law, in both civil and criminal cases.

By the present section 19 of article 6 of our Constitution, judges are prohibited from charging juries with respect to matters of fact, and this same prohibition was found in the Constitution of 1849. (Art. 6, sec. 17, Const. of 1849.)

This restriction upon the power of judges to charge juries with respect to matters of fact is one that is only found in the Constitutions of seven other States besides California, to-wit: Arkansas, Delaware, Louisiana, Nevada, South Carolina, Tennessee and Washington. (Stimson Federal and State Constitutions, p. 353.) No such restriction upon the power of judges exists in the Federal practice, and such restrictions were unknown at the common law.

In the case of *People* v. *Taylor,* 36 Cal. 266, Sanderson, J., discussing the policy of this provision in the State Constitution, said:

> "At common law the judges are not thus fettered, but are allowed to charge in respect to facts and express their opinion as to the weight of the evidence (*People* v. *King,* 27 Cal. 513). They may, therefore, direct the attention of the jury to the facts and circumstances which they deem of controlling weight, and warn them against false lights.

> Which is the wiser rule it is not for us to say; but it admits of serious doubt whether the cause of justice has been promoted by the adoption of the rule by which the courts of this state are governed. There could have been no object for the change except to afford to life and liberty further protection against judicial dishonesty and tyranny. Such a movement would have found fitting occasion when Henry VIII divorced his wives and kindled the fires of the auto de fe, or when Jeffreys advised and judicially enforced the despotic and sanguinary measures of James II. But in this day and place the ermine is not the gift of tyrants, but of the people, whose will is subserved by an honest—not corrupt—exercise of its functions; and to deprive the jury of the aid and experience of the judge in sifting and weighing the testimony may be of doubtful wisdom."

This criticism by Judge Sanderson is just as pertinent today as when he made it and in the opinion of your section this restriction serves no useful purpose, but simply increases the chances of error in the record, due to some comment made by the trial judge not intended to influence the jury on questions of fact, but nevertheless susceptible of the construction that it may have so influenced them and thus constitute error.

Your section believes with Judge Sanderson, that the power of charging juries with respect to matters of fact might very safely and properly be given to our elected judges.

2nd: We also recommend that section 7 of article 1 of the State Constitution be amended by providing for a jury of seven in criminal cases, six to be competent to render a verdict, in all cases other than those involving the death penalty, and by a jury of seven in civil cases, five to be competent to render a verdict in all cases, and that in cases of misdemeanor the jury may consist of seven, or of any number less than seven, upon which the parties may agree in open court.

Such a reduction in the number of jurors by an amendment of our State Constitution would not violate any provision of the United States Constitution.

> *Maxwell* v. *Dow,* 176 U. S. 594, 20 U. S. Supt. Ct. R. 448.

It seems that the sacred number of twelve has for its main foundation the fact that the number of the apostles and the original number of the Jewish tribes was twelve.

Thayer's Preliminary Treatise on Evidence at the Common Law, p. 90.

The advantage of reducing the number of jurors in a saving of time and expense is too obvious to need any elaboration. A reduction in the number of jurors and a verdict of less than all was advocated by Mr. Van Dyke, afterwards a Justice of our Supreme Court, in the Constitutional Convention of 1879. (Vol. 1, Const. Debates, 1878-79, p. 84.) Mr. Caples and Mr. Huestis took similar positions. (Debates, pp. 138, 151.)

3rd: Under the present law the grand jury cannot compel one of two co-conspirators or co-offenders to testify against his will. The difficulty with this situation, so far as offenses against election laws are concerned, has been very fully covered by the provisions of section 10 of the Purity of Election Laws. (Stats. 1907, p. 671.) This section is founded upon section 23 of the Purity of Election Law of 1893.

Stats. 1893, p. 26, and amended in 1905, Stats. 1905, p. 93.

This statute might very well be enlarged to cover offenses generally. A copy of the law as it would read when applicable generally is appended, with such modifications of section 10 of the Purity of Election Laws as brings it in line with a federal statute upon the subject of compelling parties to testify in proceedings before the Interstate Commerce Commission or connected therewith.

27 U. S. Stats. at Large, 443; 3 U. S. Comp. Stats. p. 3173.

The California provision respecting the forced giving of testimony in election cases has been sustained as constitutional in

Ex parte Cohen, 104 Cal. 524.

And the federal statute along similar lines has been upheld as proper and valid legislation in

Brown v. *Walker,* 161 U. S. 591; 16 U. S. Supt. Ct. R. 644.

The California statute is based upon the Corrupt Prac-

tices Prevention Act of New York, and is also found in the English statute on the same subject.

Mr. Justice Harrison, speaking of this statute in the Cohen case, page 529, says:

> "Statutes containing similar provisions have been passed in many of the states of this country for the purpose of securing conviction for offenses in which two or more persons are required to participate in order to constitute the offense, such as bribery, gambling, dueling, usury, selling intoxicating liquors, and others; the legislatures doubtless considering that the offense would be effectually suppressed if one of the offenders only could be punished, and for that purpose making his participant in the offense a competent witness by exempting him from punishment."

Mr. Wigmore, author of the standard work on evidence has characterized the California statute as the best of such statutes in any of the states. (See, also, on general subject, Cal. Pen. Code, secs. 64, 89, 232 and 334; Cal. Pol. Code, sec. 304; 4 Wigmore on Ev. sec. 2281, pp. 3167 *et seq.*, notes; and 5 Wigmore on Ev. sec. 2281, pp. 235 *et seq.*, and notes.)

4th: In 1905 an attempt was made to modify the law in some features, to do away with the professional juror, on the one hand, and on the other hand to encourage jury service of a better class by making it easier for that class to serve. The changes in the law were modeled somewhat after the practice adopted in New York in 1896, with reference to the city and county of New York.

Briefly the scheme was this: After a short term of service the juror was to be discharged and thereafter he could not only claim to be exempt from jury service, but was incompetent for jury service within a year after he had received his discharge. This would bring about the result that after a short term of service a man would be exempt from all jury service for the period of one year, and he would not only be exempt from service but he would be rendered incompetent for service so that he could be challenged on that ground, and thus the professional juror could be eliminated from our juries.

The New York law which is found in section 1084 in Gilbert's Annotated Code of New York, 1905 edition, reads as follows:

> "The jury year, in the city and county of New York, commences on the first day of October. A person who has

actually served as a trial juror, in a court of record of the State, within the city and county, twelve days within a jury year, is entitled to be discharged by the court, except that he shall not be discharged until the close of the trial in which he is serving, when the twelve days expire. A person discharged as prescribed in this section, is, thereafter, during the same jury year, exempt from jury service in any county of the State; but in the city and county of New York, a person so discharged may be excused for the following jury year. Where the certificate of one or more clerks of the courts, made as prescribed in section 1089 of this act, shows that a person is entitled to a discharge as prescribed in this section, the commissioner of jurors must, upon request, certify to the fact. A person cannot serve as a trial juror in courts of record at more than two terms in a jury year."

Sec. 1084, Gilbert's Ann. Code of N. Y., 1905.

By section 812 of the United States Revised Statutes no person shall be summoned as a juror in any circuit or district court more than once in two years, and the fact of attendance in court as a juror at any trial of said court, within two years, shall be sufficient cause of challenge of any juror, and by a provision of the Act of June 30, 1879, chapter 52, section 2 (1 U. S. Comp. Laws, 1901, p. 624) it is provided that no person shall serve as a petit juror in more than one trial in any one year.

In 1905, therefore, bills were introduced in the legislature of the State of California to amend sections 199 and 200, Code of Civil Procedure, and to add a new section to that code to be known as 200a. By section 199, C. C. P., as the amendments were originally introduced, it was provided that a person was incompetent to act as a juror who had been discharged as a juror by any court of record in the state within a year, as provided in section 200a of the code. By the amendment to section 200 it was provided that a person was exempt from jury service who had been discharged as thereinafter provided, and by section 200a the method for the discharge of a juror requiring his discharge as a juror from the panel was provided after a short designated term of service. There were other amendments pending in the legislature at the same time, for the amendment of sections 199 and 200, C. C. P. Fearing the confusion that might arise if both amendments were passed, an effort was made to incorporate in each set of amendments the provisions of both.

The result was the passage of amendments to sections 199 and 200, C. C. P., without the adoption of the amendment providing for the addition to the code of 200a, C. C. P. This last amendment passed both houses of the legislature, but was vetoed by the Governor at the request of a Superior Judge, who wrote a strong letter in opposition to the adoption of 200a, C. C. P., on the ground that it would do away with the professional juror, to retain whom in service the judge expressed himself with a courage worthy of a better cause.

The result is that the present section 199, C. C. P., refers to a discharge of a juror under section 200, which makes a juror exempt from service who is discharged as thereinafter provided. This is meaningless because of the failure to add section 200a to the code.

Superior Courts, however, in some jurisdictions, in the exercise of caution, have decided to read these two sections as though they made a juror exempt and incompetent who, having served on one jury, was discharged by the discharge of the jury, after it had completed its services.

Your section therefore recommends a further amendment of sections 199 and 200, C. C. P., so that the present provisions of these sections shall refer to a section 200a, to be added to the code, and recommends the addition to the code of a section 200a, C. C. P., which shall provide for the discharge of a juror after he has served as such for twelve days, except that he shall not be discharged until the close of the trial in which he is serving when the twelve days expire, and also providing for his discharge if he remains upon any panel for a period of two months and as a member of such panel attends court whenever summoned.

Investigation of our jury panels in San Francisco disclosed the fact that men were kept on the panels in various departments for periods of time varying from four to eight months. The result of cutting down the term of service in New York city has worked satisfactorily there and brought about a better class of jurors, and it is only reasonable to expect that such provisions in the law should have such an effect.

In the first place with a reasonable length of time for service a citizen summoned for jury service has less excuse for seeking to be relieved, and the hands of the judge are strengthened by the reasonable character of the service re-

quired, in opposition to the pressure brought to bear upon him by those seeking to avoid service.

An amendment of this character in 1905 received the support of both houses of the legislature after very full discussion in the judiciary committees of both houses, and only failed through the veto of the Governor, as before recited.

In 1907 section 200, C. C. P., was amended by providing that in counties having less than 5000 population a juror could not claim exemption by reason of his discharge within a year. This amendment was doubtless enacted in the light of the construction of sections 199 and 200, C. C. P., which the Superior Courts had been forced to take in view of the incomplete character of the sections as they then stood.

There are only nine counties in the state having a population of less than 5000, to-wit: Alpine, Del Norte, Inyo, Lassen, Mono, Plumas, Sierra, Trinity and Mariposa.

No occasion for making an exception in favor of these counties will probably arise if the law provides that a juror shall only be discharged after twelve days of service, instead of being discharged, as is now the practice in some of the Superior Courts, after service in a trial lasting only a day, so that in any new enactment the proviso in favor of counties having a population of less than 5000 may properly be omitted. Such a proviso is unconstitutional as the only purpose for which counties may be classified by population under section 5 of article 11 of the Constitution, is for the purpose of fixing the salaries of county officers.

Pratt v. *Browne,* 135 Cal. 649.

5th: Your section also recommends that the provisions of section 1089 of the Penal Code, providing for the selection of alternate jurors in criminal cases, who are to take the places of jurors in the event of death or illness of any of the original jurors, be extended to apply to jurors in civil cases.

6th: Your section also recommends that the number of peremptory challenges by the defense in a criminal case be reduced to that allowed by the prosecution, so that the number of peremptory challenges by the defense shall be ten, if the offense charged be punishable by death or imprisonment in the state prison for life, and five for any other offense, those being the numbers to which the prosecution is now

entitled in such cases. The present law gives the defense twice as many challenges as the prosecution.

7th: By section 204 of the Code of Civil Procedure the list of grand jurors is made up by the various Superior Courts and the list of trial jurors is made up by the Supervisors of the respective counties, except that in counties and cities and counties having a population of 100,000 or over, the list of trial jurors is made up by the judges of the Superior Courts of the respective counties.

The counties of Alameda, Los Angeles and San Francisco are the only counties having a population of 100,000 or over. The burden of selecting trial jurors, imposed upon the Superior Courts in these counties, is quite onerous and has not always produced altogether satisfactory results.

Your section therefore suggests that this section of the code be amended leaving the selection of grand jurors with the courts, as it is now, but providing that the selection of trial jurors shall be made as the courts in the respective counties may determine, provided, however, that the courts must direct that the trial jurors be selected either by the judges of the court itself or by the supervisors of the county or the assessor or the tax collector, or by a commissioner of juries to be appointed by the court. The jury year shall be from the 1st day of January to the 31st day of December following, and the court must, by order made in the month of October of each year preceding the preparation of jury lists, direct in what manner juries shall be selected for the succeeding jury year and may, in such order, require that a designated number of jurors be selected or so far as it is possible to obtain such a list, that the jury list consist of all persons in the county eligible for jury service.

The party so selected to make up jury lists shall, in all other respects, be governed by the existing provisions of law respecting the making of jury lists, and in the event that the jurors selected for any jury year be exhausted before the expiration of the year, the courts may by order, direct the return of any other jury list or lists for the balance of the jury year, in any one of the modes above provided.

In the event that a jury commissioner be appointed to return jury lists he shall receive as compensation for his services a sum of money equivalent to the sum of $5.00 per diem for each and every day necessarily and actually engaged in

preparing such jury list, and his compensation for such services shall be first approved by the Superior Court appointing him or a judge thereof, and audited and paid as a county charge.

Respectfully submitted.

WILLIAM DENMAN,
ALEXANDER D. KEYES,
ALLEN G. WRIGHT,
Chairman.

Note—Mr. J. F. Bowie, the other member of the section, is absent from the State.

———— Bill No. ——.

AN ACT TO ADD A CHAPTER IV TO TITLE 4 OF PART 2 OF THE PENAL CODE RELATING TO THE COMPULSORY PRODUCTION OF TESTIMONY IN CERTAIN CASES.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. A chapter is hereby added to Title 4 of Part 2 of the Penal Code, to read as follows:

CHAPTER IV.

Compulsory production of testimony in certain cases.

931. A person offending against any of the provisions of this code or against any law of this state, is a competent witness against any other person so offending, and may be compelled to attend and testify and produce any books, papers, contracts, agreements or documents upon any trial, hearing, proceeding or lawful investigation or judicial proceeding, in the same manner as any other person. If such person demands that he be excused from testifying or from producing such books, papers, contracts, agreements or documents, on the ground that his testimony or that the production of such books, papers, contracts, agreements or documents may incriminate himself, he shall not be excused, but in that case the testimony so given and the books, papers, contracts, agreements and documents so produced shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying, except for perjury in giving such testimony, and he shall not be liable thereafter to indictment or presentment by information, nor to prosecution nor punishment for the offense with reference to which his testimony was given, or for or on account of any transaction, matter or thing concerning which he may have testified or produced evidence, documentary or otherwise.

No person shall be exempt from indictment, presentment by information, prosecution or punishment for the offense with reference to which he may have testified as aforesaid, or for or on account of any transaction, matter or thing concerning which he may have testified as aforesaid, or produced evidence, documentary or otherwise, where such person so testifying or so producing evidence, documentary or otherwise, does so voluntarily or when such person so testifying or so producing evidence, fails to ask to be excused from testifying or so producing evidence, on the ground that his testimony or such evidence, documentary or otherwise, may incriminate himself, but in all such cases, the testimony or evidence, documentary or otherwise, so given may be used in any prosecution or proceeding, civil or criminal, against the person so testifying or producing such evidence, documentary or otherwise.

Any person shall be deemed to have asked to be excused from testifying or producing evidence, documentary or otherwise, under this section, unless before any testimony is given or evidence, documentary or otherwise, is produced by such a witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation, shall distinctly read this section of this code to such witness, and the form of the objection by the witness shall be immaterial, if he in substance makes objection that his testimony or the production of such evidence, documentary or otherwise, may incriminate himself, and he shall not be obliged to object to each question, but one objection shall be sufficient to protect such witness from prosecution for any offense concerning which he may testify, or for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, upon such trial, hearing, proceeding or investigation.

SEC. 2. This act shall take effect and be in force from and after its passage.